Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-284

JOHN V. TERRY and ALINE S. TERRY,
Petitioners,

v.

KLAMATH PRODUCTION CREDIT ASSOCIATION,
a corporation,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL, THIRD APPELLATE DISTRICT, CALIFORNIA

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PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No.

JOHN V. TERRY and ALINE S. TERRY,
Petitioners,

v.

KLAMATH PRODUCTION CREDIT ASSOCIATION,
a corporation,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL, THIRD APPELLATE DISTRICT, CALIFORNIA

Petitioners respectfully pray that a writ of certiorari issue to review the decision and opinion of the Court of Appeal, Third Appellate District of the State of California entered in this proceeding March 30, 1979, hearing denied in the California Supreme Court May 23, 1979.

OPINIONS BELOW

The opinion of the Court of Appeal of the State of California to the Third Appellate District is attached to this petition as Appendix A1, and California Supreme Court denying hearing as Appendix A2.

The pleadings and proceedings before the Superior Court for the State of California are attached hereto as Appendix B1-6. And the proceedings before the Court of Appeal to the Third Appellate District for the State of California is attached as Appendix C1-20.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(3) "... when any title, right, privilege or immunity is especially set up or claimed under the Constitution . . . of . . . the United States", and Amendment XIV to the United States Constitution.

QUESTIONS PRESENTED

Is it the property of Petitioners being taken without due process of law by failure to grant them a trial or hearing upon their complaint (and their complaint is to enjoin enforcement of an unjust judgment)?

STATUTES INVOLVED

Amendment XIV of the United States Constitution, and California Code of Civil Procedure, Section 170, subsection 5.

STATEMENT OF THE CASE

John V. Terry and Aline S. Terry are husband and wife, homesteaders, ranchers and farmers operating in Modoc and Siskiyou Counties in California. They instituted the present action in the Superior Court for Modoc County, California, against Klamath Production Credit Association, the government corporation designed to provide operating capital to farmers for use in their ranching operations, to enjoin the enforcement of an unjust judgment obtained by Klamath Production Credit Association against the Terrys, threatening the foreclosure and sale of the Terrys' ranch, equipment and livestock for collection of same.

The history of the prior litigation would be evidentiary but not necessarily controlled herein. It involved an action initiated by Klamath Production Credit Association (hereinafter referred to as KPCA) against John V. Terry and Aline S. Terry (hereinafter referred to as Terrys) to foreclose security interest against their ranch, livestock and farm equipment. The Terrys cross complained for fraud, deceit and undue influence and breach of confidential relationship by the KPCA, voiding the security instruments and seeking damages sustained by them thereby. The trial judge and jury in separate findings found KPCA guilty of deceit and undue influence and set aside the security instruments being foreclosed, and awarded the Terrys damages against KPCA. The instructions to the jury and the verdict form had been agreed upon by KPCA counsel and Terry counsel. No assignment of error was taken thereon and no argument was made thereon before the California Court of Appeal to the Third Appellate District.

The Constitution of the State of California, California Statute and California precedent prohibit a Court of Appeal from re-examining facts tried before a jury and finding differently, and entering judgment in accordance with different findings. The California Court of Appeal to the Third Appellate District did just that. It denied a petition for rehearing based thereon. Hearing was denied by the California Supreme Court. The challenge for denial of due process, taking of the property under 42 U.S.C.A. Section 1983, was likewise denied in the federal courts. Thereafter a summary judgment was entered against the Terrys in the Superior Court for Siskiyou County, California. An appeal from said summary judgment was refused by the California Court of Appeal to the Third Appellate District. Hearing was denied by the California Supreme Court. Certiorari was denied by this Court. Thereafter the Terrys filed the present action to enjoin enforcement of the unjust judgment.

Terrys assume that refusal of all hearings was based upon the doctrine of judicial immunity in that the judges of the California Court of Appeal to the Third Appellate District were immune from judicial proceedings on their actions. If they don't want to grant a rehearing for their actions, they have a right to do so. Likewise, the California Supreme Court has absolute discretion in the granting of a hearing. This, however, leaves open the question: Is the Terrys' property being taken without due process of law by procedural court without merit? On this question the Terrys have never been granted a hearing.

In the instant case the Terrys filed their suit to enjoin enforcement of the unjust judgment. A Demurrer to their complaint was sustained without leave to amend. Their appeal was dismissed with penalties

assessed against them. The California Supreme Court denied hearing. The judges, who were responsible for the judgment, and who were challenged by petition for disqualification and forbidden by California state law to preside in further proceedings, acted in spite of the law and apparently in contempt thereof.

Terrys are herein seeking, and believe they are entitled to, under the law, the trial on the issue of whether or not KPCA has an unjust judgment against them which they should be restrained from enforcing against their property. The order sought from this Court is to remand this case to the California Court of Appeal, Third Judicial District, commanding it to transfer this case to another district. The order sought from this Court is to set aside the order of the California Court of Appeal to the Third Appellate District dismissing Terrys' appeal and assessing penalties, ordering either that the case be transferred to another appellate district or that Justices Puglia, Regan, Janes, Paras and Evans be disqualified from sitting thereon. And that the Terrys be given a hearing by an appellate court of the State of California consisting of judges not involved in prior proceedings to determine if they are entitled to a trial under California law.

REASONS FOR GRANTING THE WRIT

The Terrys are going to lose their lifetime's work in their ranch, livestock and equipment to KPCA because of an unjust judgment without a hearing.

A. Now That Judicial Immunity Has Been Clearly Established, Limitation of Judicial Authority Should Be Established in Like Manner.

The Fourteenth Amendment to the United States Constitution and 28 U.S.C.A. 1983 provide a lawful

remedy as to all but the judiciary. There is no other court other than this Court that is available to the Terrys.

B. A California Law Provides the Remedy Which the Terrys Are Seeking, Which Has Been Denied Them Herein.

A suit in equity, as the Terrys are bringing, is the proper manner for attacking the judgment in which the jurisdiction of the court has been imposed upon. (40 CAL JUR, 3rd, page 490, section 122, "a judgment may be attacked in four ways . . . (4) by independent suit in equity." *Lowenthal vs. Lowenthal,* 279 P.2d 119; *Fletcher vs. Superior Court of Sacramento County,* 79 Cal. 468, 250 P. 195; *Fisch & Company vs. Superior Court of Los Angeles County,* 6 Cal.2d 21, 43 P.2d 855; *Biggs vs. Biggs,* 103 Cal.2d 741, 230 P.2d 32; *Bergloff vs. Reynolds,* 181 Cal.2d 349, 5 CAL RPTR 461.

And yet the Terrys were granted no hearing either in the Superior Court, the Court of Appeal or the Supreme Court on their lawful complaint.

C. The Judges of the California Court of Appeal, Third Appellate District, Being Disqualified to Act Under California Law, Denied the Terrys of Due Process in Acting Contrary to Law.

California Code of Civil Procedure, Section 170, subsection 5 provides for disqualification of the judges under the California system as follows:

> "5. BIAS OR PREJUDICE; DECLARATION BY JUDGE; AFFIDAVIT; OBJECTIONS; CONSENT OR ANSWER; DETERMINATION; NEW JUDGE."
>
> . . .
>
> "When it is made to appear probable that, by reason of bias or prejudice of such justice or judge a fair and impartial trial cannot be had before him."
>
> . . .

> "Whenever a judge of a court of record who shall be disqualified under the provisions of this section, to sit or act as such in any action or proceeding pending before him, neglects or fails to declare his disqualification in the manner hereinbefore provided, any party to such action or proceeding who has appeared therein may present to the court and file with the clerk a written statement objecting to the hearing of such matter or the trial of any issue of fact or law in such action or proceeding before such judge, and setting forth the fact or facts constituting the ground of the disqualification of such judge."
>
> . . .
>
> "No judge of a court of record, who shall deny his disqualification, shall hear or pass upon the question of his own disqualification; but in every such case, the question of the judge's disqualification shall be heard and determined by some other judge agreed upon by the parties who shall have appeared in the action or proceeding, or, in the event of their failing to agree, by a judge requested to act by the chairman of the Judicial Council, and, if the parties fail to agree upon a judge to determine the question of the disqualification, within five days after the expiration of the time allowed herein for the judge to answer, it shall be the duty of the clerk then to notify the chairman of the Judicial Council of that fact; and it shall be the duty of the chairman of the Judicial Council forthwith, upon receipt of notice from the clerk, to request some other judge, not disqualified, to hear and determine the question . . ."

These provisions were violated by the California Court of Appeal to the Third Appellate District in absolute contempt. The judges who were disqualified made the rulings in direct violation of the law: (1) They filed no affidavit challenging Terrys' charge of

prejudice and (2) they ruled on their own prejudice and promptly dismissed Terrys' appeal and assessed damages. A hearing was denied by the Supreme Court of California, no reason being given.

Here it should be noted that Justice Janes of the Court of Appeal to the Third Appellate District is likewise the Chairman for the Commission on Judicial Performance[1] The California Supreme Court is under investigation by the Committee on Judicial Performance for actions on prior decisions, i.e. withholding of publication of decision until after election at the same time the Terry matter was being presented. It makes it pretty tough to rule against a judge who is judging your own performance.[2]

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[1] Commission on Judicial Performance for the State of California shows Justice Bertram D. Janes as Chairman thereof.

[2] *The Oregonian,* June 20, 1979, News Analysis: Court Erodes in California; Tom Goldstein (New York Times News Service) ". . . Last week, a public investigation of the court began. Judges and their aides were to be questioned about whether the announcement of an unpopular decision was delayed until after last fall's election, when four justices were on the ballot. Investigators are also trying to trace unauthorized disclosures from the court . . ."

CONCLUSION

The execution of the Terrys' life work should not be allowed by a temporary derailment of the California Appellate Court system (and it would be impossible to believe that such a great court could be other than temporarily derailed). This Court to prevent such a gross and total injustice should use the extraordinary writ of certiorari to preserve at least the appearance of fairness in our judicial system and wipe out the apparent judicial contempt for the law in this case.

Respectfully submitted

GLENN D. RAMIREZ
514 Walnut Street
Klamath Falls, Oregon 97601
Telephone: (503) 884-9275
Attorney for Petitioners

Dated: August 20, 1979

APPENDIX

APPENDIX A1

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
IN AND FOR THE THIRD APPELLATE DISTRICT

3 Civil 18350

Modoc 9257

JOHN V. TERRY

v.

KLAMATH PRODUCTION CREDIT ASSOCIATION

FILED MARCH 30, 1979

By the Court:

Respondent's motion to dismiss the appeal is granted and the appeal filed on January 15, 1979, is dismissed. Pursuant to section 907 of the Code of Civil Procedure and rule 26(a), the sum of $1000 is assessed against the appellants as a penalty and added to the costs for the taking of a frivolous appeal. (Nelson v. Crocker Nat. Bank (1975) 51 Cal. App. 3d 536, 541-542; Taliaferro v. Taliaferro (1960) 178 Cal. App. 2d 140, 145) Dated: March 30, 1979.

JANES, Acting P. J.

cc: Glenn D. Ramirez
Attorney at Law
P. O. Box 368
Klamath Falls, Oregon 97601

cc: Correia, Bacon & Kaster
Attorneys at Law
P.O. Box 510
Yreka, CA. 96097

APPENDIX A2

CLERK'S OFFICE, SUPREME COURT

4250 STATE BUILDING

SAN FRANCISCO, CALIFORNIA 94102

March 30, 1979

I have this day filed Order .....

.....

.....

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.....

.....

Hearing Denied

In re: 3 Civ. No. 18350

TERRY

vs.

KLAMATH PRODUCTION CREDIT ASSN.

Respectfully,

G. E. BISHEL
Clerk

APPENDIX B1

IN THE SUPERIOR COURT FOR MODOC COUNTY, CALIFORNIA

No. 9257

JOHN V. TERRY and ALINE S. TERRY
Plaintiffs,

vs.

KLAMATH PRODUCTION CREDIT ASSOCIATION, a corporation,
Defendant.

Suit to Enjoin Enforcement of Judgment and Decree

Plaintiffs complain and allege:

I

That Plaintiffs are farmers owning and operating property located in Modoc and Siskiyou Counties, California, and their residence is in Modoc County, California.

II

That Klamath Production Credit Association is a Federally chartered instrumentality of the United States, with its principle place of business in Klamath Falls, Oregon, and doing business in Modoc and Siskiyou Counties, California.

III

That between 1967 and 1972, Defendants obtained security interests in Plaintiffs' property located in Modoc and Siskiyou Counties, California, through deceit and undue influence.

IV

That in 1972 Defendants instituted a suit against Plaintiffs to foreclose against Plaintiffs' properties in Siskiyou County, California, Superior Court No. 24951, and Plaintiffs cross-complained, alleging that the security instruments were void and enforcement thereof not permissible by reason of fraud, deceit, undue influence, and breach of fiduciary relationship. Plaintiffs further cross-complained for damages for losses resulting from such unlawful acts of Defendant, and a jury was duly empaneled and sworn to try the case, and after all the evidence was received, was instructed on the law and found that the Defendant was guilty of deceit and undue influence, that the Plaintiffs had been damaged in the sum of $60,000.00 and entitled to punitive damages in the sum of $5,000.00 by reason of the wrongful and oppressive acts of the Defendant. That the trial judge, in his own independent findings, found, in accordance with the findings of said jury, that the documents upon which the Defendant had based its cause of suit were unenforceable and void and that Defendant should take nothing thereby.

V

That the Defendant did thereafter appeal to the Court of Appeal, Third Appellate District of the State of California, and secured a mandate unlawfully and unjustly setting aside Plaintiffs' aforesaid judgment and decree, and ordering judgment for the Defendant; that thereafter the Superior Court for Siskiyou County, California, did enter a summary judgment as per said mandate; that upon appeal to the Court of Appeal for the Third Appellate District of California, said court refused to hear said appeal, and the Supreme Court of the State of California did reject a petition for hearing; and that now the Defendant is intending to enforce said unlawful and unjust judgment against the Plaintiffs, threatening the loss of their ranch and remaining equipment, all unlawfully and unjustly as aforesaid herein stated.

VI

That Plaintiffs are without remedy at law and will suffer irreparable and irremediable loss should the Defendant be permitted to enforce said judgment and decree obtained as aforesaid against the Plaintiffs' ranch and holdings.

WHEREFORE, Plaintiffs pray a decree of this Court perpetually enjoining Defendant from enforcing its judgment and decree against the properties of Plaintiffs, for their costs and disbursements herein incurred, for such other and further relief as may appear meet and just in the premises.

/s/ GLENN D. RAMIREZ
Glenn D. Ramirez

We, JOHN V. TERRY and ALINE S. TERRY, each under penalty of perjury, depose and say: That we are the Defendants in the above-entitled cause; and that the foregoing Petition is true, as we verily believe.

DATED this 16th day of October, 1978.

/s/ JOHN V. TERRY
John V. Terry

/s/ ALINE S. TERRY
Aline S. Terry

APPENDIX B2

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF MODOC

No. 9257

JOHN V. TERRY and ALINE S. TERRY, *Plaintiffs,*

vs.

KLAMATH PRODUCTION CREDIT ASSOCIATION, a corporation,
Defendant.

Demurrer

Defendant, KLAMATH PRODUCTION CREDIT ASSOCIATION, demurs to the Complaint and as grounds of demurrer specifies:

1. The Complaint does not state facts sufficient to constitute a cause of action.

2. That the Complaint and each and every cause of action and purported cause of action therein alleged is barred by res adjudicata and plaintiffs are estopped by the judgment and judgments heretofore made and entered with respect of the matters alleged in said Complaint.

WHEREFORE, defendant prays that:

1. This Court take judicial notice of the files, records, matters and proceedings in the certain action entitled Klamath Production Credit Association, plaintiff, vs. John V. Terry, Aline S. Terry, et al, defendants; John V. Terry and Aline S. Terry, cross complainants, vs. Klamath Production Credit Association, a corporation, cross defendant, officially numbered 24951 in the Superior Court of the State of California, for the County of Siskiyou, and the Opinion of the Court of Appeals of the State of California, in and for the Third Appellate District and officially designated

as 3 Civil No. 15090, and particularly, but without limiting the generality of the foregoing, that certain Summary Judgment and Decree of Foreclosure made and entered the 25th day of August, 1977 in said action No. 24951, as well as the Remittitur and Remitturs upon appeals heretofore taken to the said Court of Appeals, both in 3 Civil No. 15634 and 3 Civil No. 15090.

2. This Demurrer be sustained and plaintiffs take nothing by their Complaint.

3. For costs of suit incurred herein.

4. For such other and further relief as the Court deems just and proper.

Dated: November 30, 1978.

CORREIA, BACON & KASTER
Attorneys for Defendant

/s/ By J. P. CORREIA
J. P. Correia

APPENDIX B3

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF MODOC

No. 9257

JOHN V. TERRY and ALINE S. TERRY, *Plaintiffs,*

vs.

KLAMATH PRODUCTION CREDIT ASSOCIATION, a corporation, *Defendant.*

Judgment of Dismissal

In this action, defendant Klamath Production Credit Association, by its attorneys, Correia, Bacon & Kaser, having appeared and demurred to plaintiffs' Complaint herein; and the issue thereby presented having been duly submitted to the Court; and the Court, on December 18, 1978, having sustained said Demurrer without leave to amend,

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that plaintiffs take nothing by their Complaint, that the same by and hereby is dismissed and the defendant Klamath Production Credit Association recover its costs herein taxed at $35.00.

Dated: December 27, 1978.

GUY MARTIN YOUNG
Judge of the Superior Court

APPENDIX C1

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT

3 CIVIL No. 18350

JOHN V. TERRY and ALINE S. TERRY,
Plaintiffs and Appellants,

vs.

KLAMATH PRODUCTION CREDIT ASSOCIATION, a corporation,
Defendant and Respondent.

Motion for Transfer of the Case

APPEAL FROM THE JUDGMENT OF THE SUPERIOR COURT
OF THE STATE OF CALIFORNIA, IN AND FOR THE
COUNTY OF SISKIYOU

HONORABLE GUY MARTIN YOUNG, JUDGE

Come now the Plaintiffs-Appellants and respectfully move the Court for an order transferring the above-entitled case to another Court of Appeal Appellate District for further proceedings herein upon the grounds and for the reasons that this Court has heard the matters and performed acts which are the basis of the Plaintiffs' case and would prevent Plaintiffs from obtaining an impartial decision in this case; or in the alternative, that Justices Robert K. Puglia, Leonard M. Friedman (retired), Edwin J. Regan, George E. Paras (prior Settlement Conference Justice), Evans and Janes, be disqualified from participating herein upon the grounds and for the reasons that they participated in the prior result which is the basis of this suit.

This motion is based upon the provisions of C.C.P. Section 171 and Section 398.

/s/ GLENN D. RAMIREZ
Glenn D. Ramirez
Attorney for Plaintiffs-Appellants

APPENDIX C2

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
IN AND FOR THE THIRD APPELLATE DISTRICT

3 Civil 18350

Modoc 9257

JOHN V. TERRY

v.

KLAMATH PRODUCTION CREDIT ASSOCIATION

FILED FEBRUARY 23, 1979

By the Court:

Appellants' motion for transfer of case is denied. Dated: February 23, 1979.

PUGLIA, P. J.

APPENDIX C3

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT

CIVIL No. 18350

JOHN V. TERRY and ALINE S. TERRY,
Plaintiffs and Appellants,

vs.

KLAMATH PRODUCTION CREDIT ASSOCIATION, a corporation,
Defendant and Respondent.

Motion for Disqualification of Justices Puglia, Friedman, Regan, Paras, Evans and Jaynes

APPEAL FROM THE JUDGMENT OF THE SUPERIOR COURT
OF THE STATE OF CALIFORNIA, IN AND FOR THE
COUNTY OF MODOC

HONORABLE GUY MARTIN YOUNG, JUDGE

Come now the Plaintiffs-Appellants and respectfully move the Court for an order that Justices Puglia, Friedman, Regan, Paras, Evans and Jaynes be disqualified from participating herein, upon the grounds and for the reasons set forth in the declaration of Plaintiffs attached hereto and by this reference incorporated herein. This motion is based upon the provisions of C.C.P. § 170.

/s/ GLENN D. RAMIREZ
Attorney for Plaintiffs-Appellants

APPENDIX C4

Affidavit

I, JOHN V. TERRY and ALINE S. TERRY, hereby declare under penalty of perjury that we are the parties Plaintiff and Appellants in the above-entitled case; that the basis of our cause of suit as explained to us by counsel, i.e., the reason this suit is being brought and maintained, is that Justices Robert K. Puglia, Leonard M. Friedman, and Edward J. Regan remanded the original case of K.P.C.A. v. Terry, Siskiyou County Superior Court No. 24951, for entry of judgment against us contrary to the findings of a trial jury and trial judge; that a Summary Judgment was subsequently entered against us in said case and an appeal was filed from said Summary Judgment, which appeal was dismissed by Justices Evans and Jaynes without hearing and without basis being given therefore; that Justice George E. Paras resided over the settlement conferences on both appeals and is disqualified under local Rule 11; that we believe that the above named judges are prejudiced against us, i.e., they are defending their own illegal acts, so that we cannot obtain a fair and impartial hearing on any matters arising in this case, as they will in effect be passing judgment upon their own personal acts, the issues being whether or not their acts were illegal and void, or erroneous and voidable—the effect in either case being that the Judgment sought to be enforced in the Siskiyou County Superior Court Case No. 24951 herein sought to be enjoined is unjust and should be restrained of enforcement; that this Court has previously ruled upon our motion to transfer the case or in the alternative to disqualify the herein named judges by ruling dated February 23, 1979, denying our motion to transfer the case, but not on the issue of disqualification of justices; that by this Affidavit and attached Motion we hereby renew our motion for dis-

qualification of justices in the interest of justice; that we make this declaration under penalty of perjury this 8th day of March, 1979.

/s/ JOHN V. TERRY
John V. Terry

/s/ ALINE S. TERRY
Aline S. Terry

APPENDIX C5

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT

3 CIVIL No. 18350

JOHN V. TERRY and ALINE S. TERRY,
Plaintiffs and Appellants,

VS.

KLAMATH PRODUCTION CREDIT ASSOCIATION, a corporation,
Defendant and Respondent.

Objection to Hearing in the Above-Entitled Case

BEFORE THE HONORABLE JUSTICES PUGLIA, P.J.,
REGAN, J., JANES, J., PARAS, J., EVANS, J.

Come now the Plaintiffs and, pursuant to C.C.P. § 170, Subsec. 5, hereby file their written statement objecting to the above-entitled matter proceeding before the Honorable Justices Puglia, P.J., Regan, J., Janes, J., Paras, J., Evans, J., upon the grounds and for the reasons that a petition for their disqualification has been filed and they have ruled against said petition contrary to the provisions of C.C.P. § 170, Subsec. 5. That there is presently pending before this Court a motion to dismiss Plaintiffs-Appellants' appeal and impose sanctions against Plaintiffs-Appellants and their attorney for seeking to restrain enforcement of an unjust judgment. This (K.P.C.A.) motion is based upon the actions of said Justices, indicating prejudice and predisposition as to Plaintiffs-Appellants and is not supported by law or fact. A ruling by said Justices at this point either way would be suspect unless supported by more law, fact, or reasoning than would be customary in a case where such predisposition did not exist. That their continued acting herein would be contrary to our American and California concept of justice and C.C.P. § 170, Subsec. 5.

/s/ GLENN D. RAMIREZ
Attorney for Plaintiffs-Appellants

APPENDIX C8

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT

3 CIVIL No. 18350

JOHN V. TERRY and ALINE S. TERRY,
Plaintiffs and Appellants,

VS.

KLAMATH PRODUCTION CREDIT ASSOCIATION, a corporation,
Defendant and Respondent.

Appellants' Opening Brief

APPEAL FROM THE JUDGMENT OF THE SUPERIOR COURT
OF THE STATE OF CALIFORNIA, IN AND FOR THE
COUNTY OF SISKIYOU

HONORABLE GUY MARTIN YOUNG, JUDGE

I. STATEMENT OF CASE

This is an appeal from an order sustaining a demurrer and dismissing Plaintiffs' complaint to enjoin enforcement of an unlawful and unjust judgment obtained by Defendant against Plaintiffs, which Defendant threatens to enforce by sale of Plaintiffs' ranch and equipment. The basis of Plaintiffs' complaint was that the Defendant had obtained notes and security interests against Plaintiffs' ranch and equipment by virtue of deceit and undue influence; that this fact was established by jury findings and a verdict in a previous trial between the parties and by the trial court's separate findings discharging the Defendant's notes and security interests as unenforceable. That the Defendant's judgment, which they threaten to enforce, is unlawful and unjust in that it is based upon findings by the Court of Appeal of the State of California for the Third Appellate District, which it was not authorized to make by law, based upon matters not before it on appeal, and which it refused to correct by

rehearing; that hearing was denied by the California Supreme Court and the Federal Court systems; and that the present suit is necessary, as Plaintiffs have no remedy at law.

The case was decided in the court below on the Defendant's demurrer, made on the following grounds: (1) that the Complaint did not state facts sufficient to constitute a cause of action; and (2) that the matters are res judicata and Plaintiffs are estopped by the judgment and judgments with respects of the matters alleged in their Complaints.

II. Summary of Issues Presented

An unlawful judgment mandated by an Appellate Court, which denies hearing thereon, is subject to a suit to restrain enforcement.

Where a judgment is unlawful and unjust, the doctrine of res judicata does not apply to a suit to enjoin enforcement thereof.

III. Statement of Facts

The facts of this case at this stage are limited to the Complaint filed by the Plaintiffs, which is set forth starting at page 1 of the Clerk's Transcript on Appeal. This recites that Plaintiffs are farmers owning property in Modoc and Siskiyou Counties, California, with their place of residence in Modoc County, California; that the Defendant is a federally chartered instrumentality of the United States doing business in Modoc and Siskiyou County, California; that the Defendant obtained security interests in Plaintiffs' property in Modoc and Siskiyou Counties, California, through deceit and undue influence; that in a suit to foreclose said security interests upon proper pleadings and after jury trial, the jury found the Defendant guilty of deceit and undue influence and awarded Plaintiff damages, and that the Trial Court, in its independent findings, found that Defendant's documents were unenforceable and void

and that the Defendant was entitled to nothing; that the Defendant did appeal to the Court of Appeal of the State of California for the Third Appellate District, which unlawfully and unjustly set aside the Plaintiffs' aforesaid judgment and decree and ordered judgment for the Defendant; that a rehearing was denied by the said Appellate Court and also by the California Supreme Court; and that Defendant is threatening to enforce its said unlawful and unjust judgment against the Plaintiffs, threatening to take their ranch and remaining equipment; that Plaintiffs are without remedy at law and will suffer an irreparable and irremedial loss should the Defendant be permitted to enforce said judgment and decree.

The Defendant, in challenging the sufficiency of the Plaintiffs' Complaint, and, arguing that res judicata and estoppel apply, asked the court to take judicial notice of the former case of K.P.C.A. v. John v. Terry, the Opinion of the Court of Appeal of the State of California for the Third Appellate District, designated 3 Civil No. 15090, and the Summary Judgment and Decree of Foreclosure which followed the Opinion of the Court of Appeals for the Tihrd Appellate District for the State of California, and the remittiturs upon the appeals taken in both 3 Civil No. 15634 and 3 Civil No. 15090.

The lower court gave no reason or basis or grounds for sustaining the demurrer without leave to amend.

IV. Argument

The Court of Appeals for the Third Appellate District went beyond the matters presented to it for review, that a judgment based upon its opinion was void by reason thereof. *Zaragosa* v. *Craven,* 33 C.2d 315, 202 P2d 73; *O'Banion* v. *Barba,* 23 C.2d 145, 195 P2d 10; *Babcock* v. *Berkson,* 121 C.A.2d 710, 264 P2d 155. That it should be declared void by the Court at first opportunity; see *In Re Estate of Pusey,* 180 Cal. 368, 181 P. 684; *Andrews* v. *Superior Court,* 174 P2d 313.

A suit in equity, as the present one, is the proper manner of attacking a judgment where the jurisdiction of the court has been imposed upon, is supported by 40 Cal. Jr. 3rd, p. 490, § 122, "A judgment may be attacked in four ways" . . . " (4) by independent suit in equity." *Lowenthal* v. *Lowenthal,* 279 P2d 119; *Fletcher* v. *Superior Court of Sacramento County,* 79 C.A. 468, 250 P. 195; *Fisch & Company* v. *Superior Court of Los Angeles County,* 6 C.A.2d 21, 43 P2d 855; *Biggs* v. *Biggs,* 103 C.A.2d 741, 230 P2d 32; *Bergloff* v. *Reynolds,* 181 C.A.2d 349, 5 Cal. Rptr. 461.

The doctrine of res judicata does not apply in a direct attack on a judgment, 40 Cal. Jr. 3rd § 160 pp. 548-549; *Pico* v. *Cohn,* 91 C. 129, 25 P. 970; *Nevaroo* v. *Caldwell,* 161 C.A.2d 761, 327 P2d 111; *McHugh* v. *Howard,* 165 C.A.2d 169, 331 P2d 674.

This case represents the answer to the question: When a litigant is taken advantage of by an appellate court acting in excess of the jurisdiction of the appellate court, which refuses to correct its own wrongful act, is there any remedy? Equity says that there is and that is this case.

CONCLUSION

The judgment of dismissal should be set aside and the case remanded for trial on Plaintiffs' Complaint.

DATED February 14, 1979.

Respectfully submitted,

/s/ GLENN D. RAMIREZ
Glenn D. Ramirez
Attorney for Terrys, Plaintiffs-Appellants

APPENDIX C7

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT

3 CIVIL No. 18350

JOHN V. TERRY and ALINE S. TERRY,
Plaintiffs and Appellants,

vs.

KLAMATH PRODUCTION CREDIT ASSOCIATION, a corporation,
Defendants and Respondents.

Motion to Dismiss Appeal, Impose Damages and Issue the Remittitur

TO THE JUSTICES OF THE DISTRICT COURT OF APPEALS OF THE STATE OF CALIFORNIA, THIRD APPELLATE DISTRICT:

Klamath Production Credit Association hereby moves the Court of Appeal of the State of California, Third Appellate District, for an order dismissing the appeal of plaintiffs-appellants, John V. Terry and Aline S. Terry, for an order imposing a penalty of damages on appellants and their attorney of record for taking a frivolous appeal and for the immediate issuance of the remittitur.

The motion is made upon the grounds that a mere inspection of the record discloses that the grounds on which this appeal is based are frivolous and totally without merit, as was the Complaint in the action.

This motion is made on this motion, on the attached declaration of J. P. Correia, the records and files of this Court in Klamath Production Credit Association v. John P. Terry and Aline S. Terry, at 3 Civil No. 15090 and in Klamath Production Credit Association v. John P. Terry and Aline S. Terry, at 3 Civil No. 17132, Memorandum of Points and

Authorities, the Motion to Dismiss Appeal, Impose Damages and Issue Remittitur in 3 Civil No. 17132, and all matters therein set forth, the attached exhibits, and the record on this appeal.

Dated: March 13, 1979.

J. P. CORREIA
CORREIA, BACON & KASTER
Attorneys for Defendant-Respondent

/s/ By J. P. CORREIA
J. P. Correia

APPENDIX C8

Modoc County, No. 9257, Civil 18350

Judge: Guy Martin Young

Notice of Appeal Filed: 1/15/79—$50.00

Nature of Action: Suit to Enjoin Enforcement of Judgment and Decree.

Glenn D. Ramirez
P.O. Box 360
Klamath Falls, Oregon 97601

Correia, Bacon & Kaster
P.O. Box 510
Yreka, Calif. 96097

JOHN V. TERRY and ALINE S. TERRY,
Plaintiffs and Appellants,

vs.

KLAMATH PRODUCTION CREDIT ASSOCIATION,
Defendant and Respondent.

1979

Feb. 20—Filed appellants' motion for transfer of case.

Feb. 20—Filed respondent's opposition to motion to transfer case.

Feb. 23—By the Court:

Appellants' motion for transfer of case is denied. Dated: February 23, 1979. Puglia, P. J.

Feb. 28—Filed 1 vol. clerk's transcript; appeal from order sustaining demurrer without leave to amend and judgment of dismissal.

1979

Mar. 12—Filed appellant's pre-argument statement.

Mar. 12, 1979—Filed Appellant's Opening Brief

Mar. 15—Filed respondent's motion to dismiss appeal, impose damages and issue remittitur.

Mar. 15—Filed appellants' motion for disqualification of Justices Puglia, P.J., Friedman, Regan, Paras, Evans and Janes. (March 23, 1979)

Mar. 15—F. decl. & O. resp. to 30 days after ruling on motion to dismiss appeal, impose damages and issue remittitur in which to file his resp.'s brief.

March 19—By the Court:

The purported motion for disqualification of justices is stricken from the record as being legally insufficient on its face (Baker v. Civil Service Com. (1975) 52 Cal. App. 3d 590, 593-594; In re Morelli (1970) 11 Cal. App. 3d 819, 843-845; Oak Grove School Dist. v. City Title Ins. Co. (1963) 217 Cal. App. 2d 678, 702; see Calhoun v. Superior Court (1958) 51 Cal. 2d 257, 260; see also Dietrich v. Litton Industries (1970) 12 Cal. App. 3d 704, 719.)

Dated: March 19, 1979

Puglia, P. J.

Regan, J.

Janes, J.

Paras, J.

Evans, J.